IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN,
Plaintiff in Error,
vs.
CHARLES RICHARDSON,
Defendant in Error.

No. 3993

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFF IN ERROR

G. P. FISHBURNE,
A. H. DENMAN,
1518 Puget Sound Bank Bldg.,
Tacoma, Washington,
Attorneys for Plaintiff in Error.

Allen & Lamborn Printing Co., Tacoma, Wash.

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ASSIGNMENTS OF ERROR

1. The Court erred in denying plaintiff's motion to strike the third and fifth affirmative defenses of the answer of the defendant.

2. The Court erred in allowing the introduction of any testimony with regard to the advisory board.

3. The Court erred in requiring Mr. Denman to testify as to the report and supplemental sheet and information sent by him to the advisory board.

4. The Court erred in requiring Mr. Denman to testify as to the knowledge of the Board of

Trustees in 1918 or the conversation of such board with regard to the five per cent commission of defendant.

5. The Court erred in excluding evidence offered by Mr. Fishburne that one of the members of the Board of Trustees in January, 1919, was the president of the bank in which the defendant was director, and that another, Mr. Harold Seddon, was put on the board by Mr. Richardson and that Mr. Moore, another member of the board, was working for the company as bookkeeper, and Mr. Davis was working for the company, and that three or four of the trustees in all were employees of Mr. Richardson working at the Pacific Cold Storage Company and that all of their jobs depended on Mr. Richardson.

6. The Court erred in excluding the evidence offered by Mr. Fishburne to prove that a majority of the Board of Trustees on January 7, 1919, were employees of Mr. Richardson, owed their jobs to him or were working for the bank of which he was a director.

7. The Court erred in excluding the evidence that at the time Mr. Miller seconded the motion for a five per cent commission, the witness did not know that Mr. Richardson was getting $1,000.00 a month prior to January 7, 1919, or the two and one-half per cent commission, and that the witness was taken by surprise when he seconded the resolution.

8. The Court erred in excluding that part of

the first and second causes of action of the plaintiff running back of January 1, 1917.

9. The Court erred in excluding the claim of Mr. Miller for the five per cent commission.

10. The Court erred in its ruling on defendant's motion for non-suit and in his statement of such ruling to the jury in allowing the defendant an offset to plaintiff's suit of a reasonable compensation for defendant's services.

11. The Court erred in stating to the jury when he ruled on the motion of defendant for a non-suit that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him.

12. The Court erred in his statement to the jury on his ruling on the motion of defendant for a non-suit in not instructing the jury that there was no liquidation of assets other than bankable paper after January 7, 1919, and in not instructing the jury that there was no resolution allowing the defendant any salary after September 30, 1919, and that the resolution of January 7, 1919, called for back pay and was hence void.

13. The Court erred in overruling the objection by the plaintiff to the introduction of any evidence by the defendant.

14. The Court erred in not giving the plaintiff judgment on the pleadings.

15. The Court erred in allowing the defendant to prove the facts relating to the formation and organization of the advisory board.

16. The Court erred in admitting defendant's exhibits 15A, 16A, 17A and 18A, all letters and correspondence and reports between Richardson and the advisory board.

17. The Court erred in allowing the defendant to testify that all of the other American stockholders consented to the five per cent commission.

18. The Court erred in admitting the testimony of Charles Richardson, B. A. Moore, L. R. Manning, Chester Thorne, Eugene Wilson, Rufus Davis, Ralph Stacy, and each one of them, as to what it was reasonably worth to liquidate the Pacific Cold Storage Company and return its assets to its stockholders.

19. The Court erred in allowing the defendant to testify that Inglis, the secretary of the advisory board, distributed circulars like the one marked "Exhibit 20A" to the stockholders.

20. The Court erred in admitting Exhibit 20A, the circular alleged to have been distributed by the secretary of the advisory board.

21. The Court erred in admitting the testimony

of Richardson, Moore, Davis and Stacy, and each one of them, as to the knowledge and informal discussion by the Board of Trustees of the five per cent commission prior to January 7, 1919.

22. The Court erred in excluding Exhibit 20, which is a telegram dated the 14th day of February, 1919, from the defendant Charles Richardson to B. A. Moore in the following language, to-wit:

"B. A. Moore,
Pacific Cold Storage Company,
Tacoma, Washington.
Your telegram a surprise. Wire or write me fully of any other stockholders connected with the matter and who they are. It was never my intention to charge him any part of my commission or anyone else connected with company. If Davis has not left ask him to get all information possible and write.

CHARLES RICHARDSON."

23. The Court erred in admitting the testimony of Ralph Stacy giving his reasons for approving the five per cent commission of Richardson and testifying among other things, "I had personal reasons for thinking it was all right. I had some stock which I bought in 1915 at 72 cents on the dollar, which eventually brought me 105, approximately $32.00 a share, almost fifty per cent."

24. The Court erred in refusing to give plaintiff's requested instruction No. 1 in the following language, to-wit:

"You are instructed that according to the ar-

ticles of incorporation and by-laws of the Pacific Cold Storage Company the Board of Trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the Board of Trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the Board of Trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action."

25. The Court erred in refusing to give plaintiff's requested instruction No. 2 in the following language, to-wit:

"You are instructed that for the month of Septemper, 1918, the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action, and $1,995 on account of the fourth cause of action."

26. The Court erred in refusing to give plaintiff's requested instruction No. 3 in the following language, to-wit:

"The law is that defendant Richardson while acting as trustee cannot receive any back pay for

past services, and if any resolution was passed by the Board of Trustees in January, 1919, giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919."

27. The Court erred in refusing to give plaintiff's requested instruction No. 4 in the following language, to-wit:

"You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

28. The Court erred in instructing the jury that the claims of Miller and Denman on the two and one-half per cent commission were barred prior to the year 1917.

29. The Court erred in that part of his instruction with relation to the five per cent commission where he said: "It would be competent for the Board

of Trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of five per cent commission upon the distribution, if from the evidence you believe that this five per cent commission arrangement was inaugurated and agreed upon prior to that time, and that the services—when I say prior to that time I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover $2.50 a share. * * *

"On the $500,000 that was distributed prior to the adoption of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the $2.50 a share the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover, but if you believe it was not worth that and that it was worth a less sum, then you must find for

the plaintiff in such sum as you believe he ought to be credited on that stock. Now, in considering the value of the services you should take into consideration the distribution or liquidation of all the assets. It might be very easy and of comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

30. The Court erred in instructing the jury that: "In order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and returned in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.

"Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more.

So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

31. The Court erred in modifying the right of the plaintiff to recover $2.50 a share on account of the commission collected by the defendant for the return of $500,000 of the capital stock in September, 1918, by saying: "If the defendant was entitled to the reasonable value, that is, if his services would be reasonably worth that, in that event the plaintiff could not recover."

32. The Court erred in excluding from the consideration of the jury the fourth cause of action, the assigned claim of Miller, for the recovery of the five per cent commission.

33. The Court erred in instructing the jury: "You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation.

34. The Court erred in instructing the jury that "If you are satisfied that the compensation is excessive then you can assess it to him—you should

give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

35. The Court erred in instructing the jury that "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

36. The Court erred in instructing the jury that "In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed

prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount."

37. The Court erred in making and entering the judgment on the verdict of the jury for the defendant.

38. The Court erred in denying the plaintiff's motion for new trial herein.

ISSUES OF THE CASE

After the formal allegations of the incorporation of the Pacific Cold Storage Company, the complaint alleges its dissolution and then alleges in the first cause of action:

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III.

That during the existence of the said Pacific Cold Storage Company the profits realized from its

business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation, that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as Trustee and President, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends, as follows, to-wit:

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2,500.00
January, 1913	100,000.00	2,500.00
January, 1914	100,000.00	2,500.00
January, 1915	60,000.00	1,500.00
January, 1916	80,000.00	2,000.00
January, 1917	80,000.00	2,000.00
January, 1918	200,000.00	5,000.00

Total Dividends, $720,000.00.

Total taken by Defendant, $18,000.00.

V.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due thereon from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action. (Transcript pp. 14 to 17.)

The second cause of action is the same as the first except that it is based on the stock of Charles A. Miller amounting to 798 shares, which shares and the rights arising out of them were assigned by Miller to Denman, and the amount stated to be due on account thereof is $1,436.40 and interest from May 31, 1918, the day the corporation was alleged to have been dissolved.

The third cause of action alleges the incorporation of the Pacific Cold Storage Company and its dissolution the same as in the first and second causes of action, and then alleges the ownership of 60 shares of stock by the plaintiff and that at the time the Pacific Cold Storage Company ceased to do business the plaintiff owned said 60 shares of stock and has at all times since been the owner of the funds of said corporation to be distributed to him on dissolution in proportion to his shares as former stockholder, and then alleges:

III.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to-wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00, and in or about the month of January, 1920, the sum of $2,500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,-500.00; that the amount so taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares.

IV.

That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff demanded payment of the sum of money above set forth from the defendant, who has paid no part of the same. (Trans. pp. 21 to 23.)

The fourth cause of action rests on the same state of facts as the third cause of action and differs from it only in the fact that it is based on an as-

signed claim of Charles A. Miller arising out of the latter's ownership of 798 shares of stock in the Pacific Cold Storage Company and amounting to the sum of $4,189.50.

The difference in the amount is found in paragraph "IV" of the fourth cause of action, wherein, after charging the defendant with the total misappropriation of $52,500.00, it says: "That the amount so taken was $5.25 for each share and included $4,189.50 belonging to said Charles A. Miller on his 798 shares," and again in paragraph "V" of the fourth cause of action, where it says: "That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $4,189.50 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920." (Trans. p. 25.)

FACTS OF THE CASE

To establish the first and second causes of action plaintiff proved that the defendant was president and one of the trustees of the Pacific Cold Storage Company from January, 1911, to September 30, 1918, and trustee until May 31, 1920; and that although the defendant was receiving a salary of $12,000.00 a year or $1,000.00 a month as such president in addition thereto and without having previously obtained any authority therefor from the Board of Trustees or stockholders of the Pacific Cold Storage Company, commencing with the year 1912 and ending with the

year 1918, the defendant under the guise of a salary misappropriated the following sums of money:

January, 1912, ...	$2,500.00
January, 1913, ...	2,500.00
January, 1914, ...	2,500.00
January, 1915, ...	1,500.00
January, 1916, ...	2,500.00
January, 1917, ...	2,000.00
January, 1918, ...	5,000.00

making a total misappropriation of $18,000.00, and that on this account there was due on the 60 shares of stock of the plaintiff F. L. Denman at the time of the dissolution of the Pacific Cold Storage Company the sum of $108.00 and on the 798 shares of Charles A. Miller, acquired by the plaintiff by assignment from said Miller, the sum of $1,436.40. (Exhibit 1, book containing Minutes and By-Laws of Pacific Cold Storage Company from its inception to its dissolution, and Trans. p. 115.)

To sustain the third and fourth causes of action it appears that the Pacific Cold Storage Company was engaged in the raising of stock and shipping and selling of all kinds of meats in Alaska and in two places in Canada, and that their important plants and most of their properties were in the following places, to-wit: Their cold storage plant and principal place of business was at Tacoma, Washington, and their branches were at Glasgow, Scotland, Nome, St. Michael, Tanana, Iditarod, Ruby and Fairbanks, all in Alaska, and Dawson and Gleichen, both in Canada. The defendant was president and one of the trustees of the company from January, 1911,

through September, 1918, and trustee alone from October 1, 1918, to May 31, 1920. (See Transcript of Record.)

Commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company sold all of its assets except office supplies of the value of $875.00 and accounts of the value of $375.00. (See Transcript, testimony of Denman, pp. 108, 109). It had sold its Alaska assets and the cold storage plant in Tacoma prior to April 5, 1918, and had obtained all the office space it required for the low rental of $20.00 per month and reduced the office force to two, a bookkeeper and stenographer in Tacoma, and another man, a Mr. Davis, to attend to the Gleichen affairs until the company made some disposition of its assets there. On April 5, 1918, all that remained to be done was to close up the company's affairs, which, according to the defendant, he hoped to complete by the first of June, 1918, and make all of its collections by the early fall of 1918. (See Plaintiff's Exhibit 13.)

Accordingly, at a meeting of the trustees of the Pacific Cold Storage Company held on April 24, 1918, in its cheap $20.00 office in Tacoma, they approved of the sale of all of the Tacoma plant and assets in Alaska and all its steamers (being two) and barges (being four) and a $60,000.00 sale of four markets and a ranch, and a $7,000.00 sale of a lease, and resolved to reduce the capital stock of the company from $1,000,000.00 to $500,000.00 and to call a

meeting of the stockholders for that purpose on July 10, 1918. (See Exhibit 1, p. 321.)

On May 31, 1918, at the annual meeting of the shareholders, a majority of them approved all of the sales made by the officers and recorded in the minutes of the company and all of the acts of the trustees and officers shown in the minutes since the last meeting of the stockholders, among which was the meeting of April 24, 1918, above mentioned, and further resolved that

> "Whereas it is the desire of the stockholders that the company should be liquidated, and all of its assets sold, and that a return of capital be made as speedily as possible, therefore,
>
> "Be it resolved, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible, and wind up its affairs, returning to the shareholders the amount realized therefor."

and appointed as trustees for the ensuing year Charles Richardson, Ralph Stacy, C. A. Miller, R. J. Davis, Harold Seddon, and B. A. Moore.

On July 10, 1918, 8022 shares of stock of the Pacific Cold Storage Company, more than two-thirds of the capital stock, among other things resolved as follows:

> "Whereas this company has assets valued at a million dollars over and above all debts or liabilities, and that the capital stock and actually paid in is the sum of one million dollars, and that the whole amount of the debts and liabilities of said company amount to $32,745.28, and,

"Whereas it appears to the interest of the company to reduce its capital stock to one half million dollars, therefore

"Be it resolved, that the capital stock of the Pacific Cold Storage Company be and is hereby diminished to one half million dollars, and that five hundred thousand dollars be repaid to the stockholders thereof as a return of capital. That the Trustees are directed to take all proper steps to make such return as speedily as possible. * * *

"Whereas, at the annual meeting of the stockholders of this company, held on May 31, 1918, it was resolved that this company should be liquidated and all of its assets sold and a return of capital made as speedily as possible, therefore,

"Be it resolved that the stockholders present in person and by proxy, hereby confirm and approve the said Resolution and authorize, and empower the trustees to make all contracts, agreements and sales necessary to be made, to fully carry out said resolution, hereby confirming and approving what they may do in the premises." (See Exhibit 1 Minutes.)

Pursuant to this resolution to reduce the capital stock and repay the stockholders $500,000.00, arrangements were made and it was returned to the stockholders on September 15, 1918. (See Plaintiff's Ex. 14 and Ex. 1, pp. 296 to 299 inc., and Trans. pp. 134, 135, 142, 163, 164, 169.) The defendant was receiving a salary of $1,000.00 a month as president of the Pacific Cold Storage Company, and yet in January, 1919, he took a commission of five per cent on said $500,000.00 returned in September, 1918, or

$25,000.00 as additional compensation. (Transcript p. 134 and answer.)

Commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company sold, including the Tacoma plant, property totalling in value $951,835.67, and nothing was sold after January 1, 1919, except office supplies of the value of $875.00 and accounts of the value of $309.99 and no assets were converted into money after January 1, 1919, except a total of receipts in the sum of $242,522.88, and said receipts consisted of notes, bonds, good accounts or liquid assets and all of it was bankable paper. (See Transcript pp. 108, 109.)

So the Pacific Cold Storage Company was in process of liquidation from November 1, 1917, until the end of December, 1918, and Charles Richardson, the defendant, was receiving for his services during that time a salary as president of $1,000.00 a month from November 1, 1917, to September 30, 1918, or $11,000, in January, 1918, a two and one-half per cent bonus on dividends of $5,000.00, and in addition thereto "for liquidation of the company" five per cent commission on the amounts returned to the shareholders amounting to the sum of $52,500.00. The minutes of the Pacific Cold Storage Company are unusually detailed and complete and yet no resolution of the Board of Directors is found in the minutes authorizing the payment of this $52,500.00 except one of January 7, 1919. This resolution incorporated correspondence between the defendant

and the advisory board consisting of a letter of July 12, 1918, from the defendant making his offer as to the compensation he was to receive for liquidation of the company, and a cable and letter from the advisory board accepting the offer and resolving "that the offer contained in the letter of Mr. Richardson of July 12th be and the same is hereby accepted and the agreement as set forth in the correspondence between Charles Richardson and the advisory board as herein referred to be and the same is hereby ratified and the officers of the company are authorized and directed to pay the compensation named and to fully carry out all the terms of the agreement.' The offer contained in the letter of Mr. Richardson of July 12 was "That I will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." (See Transcript pp. 45, 46, 53-55.)

There was an attempt by defendant to get around the well settled principle of law that "no officer of a corporation can receive any compensation for the performance of official duty except by express contract preceding the rendering of the services" by proving that there was such an agreement made by an informal verbal resolution of the trustees of the Pacific Cold Storage Company prior to the rendition of the services by the defendant, which was not made a part of the minutes.

The only witnesses to prove this resolution were Richardson, Moore, Davis and Stacy.

Mr. Richardson was unable to remember the date of such resolution either in 1917 or 1918 and could not say positively how many trustees were present, saying "I think three or four, four perhaps," and gave as the names of the four "I think Mr. Stacy and Mr. Moore and myself and Mr. Davis," and testified that at the time the four discussed it there was no resolution or anything to that effect allowing the defendant the five per cent commission and that none of these alleged informal resolutions were spread upon the minutes because they did not want the public and Waechter Brothers, their competitors, to know what they were doing. (Transcript 143, 144, 145, 158, 159.) It is queer that the Pacific Cold Storage Company on May 31, 1918, should spread a resolution upon the minutes of the company to sell its property and wind up its affairs and yet should not add the amount of compensation to be received by Richardson for fear of the competitors of the company.

Mr. Moore on direct axamination testified that he was present at a trustees' meeting held immediately after the stockholders' meeting in May, 1918, but on cross-examination he said he did not remember the date of the meeting in May, 1918, and that it was not unlikely it was after that date and that it was very likely after May 31, 1918, and the only people he remembered as being present were "myself and Mr. Richardson and Mr. Davis, possibly, and Mr. Stacy."

Again on direct examination Mr. Moore testi-

fied that during the summer of 1918 Mr. Richardson showed to him correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for five per cent, and to the question "Do you recall whether Mr. Stacy was there or not at that time?" he replied, "Well, in August, 1918, I think it was likely he was," and to the question "What is your recollection?" he said, "I think the meeting would not have been held without his presence," and to the question, "Who else was there, do you recall?" he said, "Mr. Stacy, myself, Mr. Richardson and Mr. Davis."

Mr. Moore on cross-examination stated that he did not know the date of the meeting in 1918 in which there was either a resolution or discussion of the five per cent commission of defendant, and to the question "Was there any resolution, was the matter up as a resolution that this should be adopted or was it voted on in any way?" replied, "Such resolution if made might appear in the record book." And to the question "Do you know whether there was ever any resolution formally coming before them?" replied, "The chances are, as I remember, there was a resolution, but as to whether it was spread on the minutes I do not know," and did not either on direct or cross examination testify at all as to the vote of the Board of Trustees. (See Transcript, pp. 161, 162, 163, 167, 168, 169.)

Mr. Davis said he could not recall any meeting of the Board of Trustees authorizing the five per

cent commission after the meeting of the stockholders of May 31, 1918, and he could not remember a formal resolution was introduced at that time or not, and the witness then testified "that the matter as to the five per cent commission was drawn to the Board of Trustees at that time 'and my recollection is that no action was taken because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from the business,' " and to the question "Was there any action taken in the way of a passage of a resolution and not spread upon the minutes, any action—it does not have to be spread upon the minutes to be a valid action—, but I want to know whether the board acted upon this matter and approved the payment of the five per cent commission to Mr. Richardson?" the witness replied, "I could not say just exactly what action was taken." It was not shown by Davis that a majority of the board ever voted to allow the defendant this five per cent commission. (See Transcript, 182, 183, 184.)

Ralph Stacy testified that he would not say how long he knew of the telegram from Inglis (of the advisory board) approving the proposition of paying Richardson five per cent, but some weeks at least, and it was not proved by him that there had been any discussion or vote of the Board of Trustees upon this five per cent commission of Richardson's prior to January 7, 1919. (See Transcript, pp. 196, 197, 198.)

So if there was any other agreement or legal resolution by the Pacific Cold Storage Company to pay Richardson this five per cent commission other than the *ex poste facto* contract embodied in the resolution of January 7, 1919, we fail to find it in the record.

Some time in 1917, when Mr. Richardson was receiving his salary and bonus, Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before Mr. Davis went up to Alberta discussing the whole situation and it was decided what they would do in every detail as to the Alberta sales. (See Transcript, 160.) Mr. Davis, under these instructions, went to Alberta in 1917 and made some progress there and again went there in June, 1918, when the principal part of the disposition of the assets took place and the various properties in Alberta were sold in 1917 and on or before August, 1918. (See Transcript, 179, 180), and practically everything had been sold before Mr. Richardson left for California in November, 1918. (See Transcript, 160.)

So in a corporation with capital stock of only $1,000,000 the defendant, commencing in January, 1911, and ending September, 1918, received in salary and bonuses the sum of $123,000, and in January, 1919, he took $25,000, in July, 1919, $25,000 and in January, 1920, $2,500, or a total of $52,500, under the guise of a commission for liquidating the company. And he does this at the time he is acting as trustee of the corporation and as such should protect the company from illegal exactions.

Practically all of the liquidating of the company requiring the services of the defendant was done before he left for California in November, 1918, and he was receiving a handsome salary and a bonus for these services up to the end of September, 1918, and yet he exacts an additional sum of $52,500 as a commission for services already rendered and paid for.

STATUTE OF LIMITATIONS NO BAR TO ANY OF FIRST AND SECOND CAUSES OF ACTION

In 1 Pomeroy Remedies, Sec. 28, it is said:

> "In cases of express continuing trusts, 'so long as the relation of trustee and *cestui que* trust continues to exist, no length of time will bar the *cestui que* trust of his rights in the subject of the trust as against the trustee, unless circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, or unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que* trust which requires him to act as upon an asserted adverse title.' "

The reason for the rule is that the possession or legal title of the trustees is the possession or title of the *cestui que* trust and the statute cannot run against the *cestui que* trust until the trust has been repudiated and the trustee's possession or title is in his own right and adverse to that of the *cestui quc* trust.

Thus, in *Oliver vs. Piat,* (U. S.) 11 L. Ed. 332, on page 409, Justice Storey says:

"The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust, and the time begins to run against the trust only from the time when it is openly disavowed by the trustee who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que* trust. * * * There may have been an unjustifiable delay and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires."

The directors of a corporation are trustees of the corporation and so the Statute of Limitation does not run against the claim of a corporation against its officers for misappropriation of corporate funds. *Ellis v. Ward,* 25 N. E. 530; *McConnell v. Combination M. & M. Co.,* 76 Pac. 195 (on re-hearing 79 Pac. 248); *Miner v. Bell Isle Ice Co.* (Mich.) 53 N. W. 218; 17 L. R. A, 412.

Thus in the case of *Ellis vs. Ward, supra,* an Illinois case, the court, on page 533, uses the following language:

"It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust-fund, (*St. Louis, etc., Min. Co. v. Sandoval, etc., Min. Co.,* 116 Ill. 170, 5 N. E. Rep., 370,) and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que* trust, to themselves, nor to waste, destroy, give away or misapply them, (*Holder v. Railway Co.,* 71 Ill. 106; *Cheeny v. Railway Co.,* 68 Ill. 570; 1

Mor. Priv. Corp. Secs. 516, 597). And it is equally well settled that no lapse of time is a bar to a direct or express trust, as between the trustee and *cestui que* trust. *Railroad Co. v. Hay,* 119 Ill. 493, 10 N. E. Rep, 29; *Wood, Lim.* Sec. 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute presents no bar to this proceeding by the receiver of the corporation. Ordinarily, an express trust is created by a deed or will, but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable; and such appears to be the relation established by law between directors and the corporation. 2 Pom. Eq. Jur. Sec. VI., p. 633; 3 Pom. Eq. Jur. Secs. 1088-1090, 1094. And see, also, as respects stockholders, *Hightower v. Thornton,* 8 Ga. 486; *Payne v. Bullard,* 23 Miss. 88;*Curry v. Woodward,* 53 Ala. 371."

Again in the case of *McConnell v. Combination M. &M Company,* above cited it was held that a series of illegal acts continuing over a period of several years such as the successive misappropriation of money for compensation illegally claimed is pursued until the commencement of an action against the officers and directors therefor by minority stockholders, laches cannot be predicated of plaintiff's delay in bringing suit. And the court on page 200 says:

"Three of these directors met, and voted one of their number a salary as secretary. The

Supreme Court, in affirming the judgment in favor of the defendant rendered in the district court, uses the following language: 'The appellant was a director of the corporation, and intrusted with its interest in a fiduciary capacity. He owed to his principal his fair, impartial, and disinterested judgment in fixing the salary of its secretary. The corporation had the right to demand of him his entire vigilance in its behalf. It is intolerable that an agent be suffered to act at the same time, in the same matter, for himself and principal too. The result of such a course, if allowed, would be manifest. The act of a fiduciary agent in dealing with the subject-matter of his trust, or the interest-matter of his trust, or the interest intrusted to his care and keeping, to his own individual gain and profit, is viewed by the courts with great jealousy, and will be set aside on slight grounds. The doctrine is founded on the soundest morality, and is frequently recognized. *Oil Co. v. Marbury,* 91 U. S. 587 (23 L. Ed.328). All transactions so tainted are voidable, without regard to the fairness or honesty of the act. *Graves v. Mining Co.,* 81 Cal. 303, 22 Pac. 665. And so a director of a corporation cannot vote himself a salary. *Ward v. Davidson,* 89 Mo. 445, 1 S. W. 846; *Butts v. Wood,* 37 N. Y. 317. The rule is enforced with great rigor against officers voting themselves salaries. *Thomp. Liab. Off.* 351. They cannot properly act on, nor form part of a quorum to act on, a proposition to increase their compensation. *Bank v. Collins,* 7 Ala. 95. Certainly they cannot vote themselves 'back pay.' It is like giving away the assets of the corporation. *Cook Stocks & S.,* Sec. 657, p. 856; *Holder v. Railroad Co.,* 71 Ill. 106 (22 *Am. Rep.* 89). See also *Wickersham v. Crittenden,* 93 Cal. 17; 28 *Pac.* 788; *Hardee v. Sunset Oil Co.* (C. C.), 56 Fed. 51. In *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854, the court, in considering the legality of the act of

four directors of a corporation in voting three of their number salaries, says: 'They are agents of the corporation, and, as in cases of other agents, their acts on behalf of their principal, in matters where their own interests come in conflict with those of the corporation—where their self-interest may tend to deprive the corporation of the full, free and impartial exercise of the judgment and discretion which they owe to their principal—are looked upon and scrutinized with great jealousy by the courts. Their acts in such cases are *prima facie* voidable at the election of the corporation or of a stockholder.' "

The opinion further says (p. 202):

"There might be some force in this contention if the complaint here made only went to a single act, but the same course of conduct was pursued up to the very commencement of this proceeding. There is no room here for any claim that either the corporation or the minority stockholders have acquiesced in or ratified this conduct. *Miner v. Ice. Co.,* 93 Mich 112; 53 N. W. 218; 17 L. R. A. 412."

Again, in the case of *Miner v. Bell Isle Ice Co.,* the court says:

"Defendant Lorman must be held to have made these contracts with himself. He directed, influenced and controlled the board. They had no personal interest in the affairs of the company and exercised not their own judgment and discretion but Lorman's will. All the authorities agree that it is essential that a majority of the quorum of a board of directors shall be disinterested in respect to the matters voted upon. In any case the burden is upon the directors to show fairness, reasonableness and good faith and

upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact.

"There might be some force in the contention that complainant is chargeable with laches if he had not commenced the former suit and the act complained of was a single one committed in 1882. Here the same course of conduct has continued up to the very commencement of this proceeding and persisted in notwithstanding its pendency. There is no room for any claim that the corporation has acquiesced in or ratified this conduct. A ratification by Lorman and his dummies of his own act could not purge it of its fraudulent character."

The foregoing case further holds that where a majority of the stock controlled the directorate and are themselves the wrongdoers they are liable for a breach of trust at the suit of a minority stockholders, and that where a number of stockholders combine to constitute themselves a majority in order to control a corporation as they see fit they become for all practicable purposes the corporation itself and assume the trust relation occupied by the corporation toward its stockholders.

The court further says:

"The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects and the relation between it and its several members is for all practicable purposes that of a trustee and *cestui que* trust. Citing *Peabody v. Flint,* 6 Allen 52-56; *Stevens v. Rutland and B. R. Co.,* 29 Vt., 550."

In the case at bar the defendant Richardson voted a majority of the stock by proxy from 1912 to the end of 1918 and owned about twelve per cent of the stock and so it would have been futile for the plaintiff Denman to endeavor to get relief through the corporation should he have desired to do so, and so the Statute of Limitations would not run against Denman. (See Plaintiff's Exhibit 1, Trans. p. 10). But even if the statute could have been construed as barring the claim of Frederick L. Denman prior to 1917 it certainly did not bar the claim of Mr. Miller prior to that date because, as shown in Assignment of Error 7, Mr. Miller did not know that Richardson was getting the two and one-half per cent commission on January 7, 1919.

ADVISORY BOARD HAS NO LEGAL EXISTENCE.

Assignments of Error 2, 3, 15, 16, 19 and 20 all refer to errors of court in admitting testimony with regard to the advisory board and the communications had between defendant and such board and the circulars distributed by such board to its members.

The only testimony as to the creation of the advisory board was admitted over the objection of plaintiff and was as follows:

"When the company was organized and the stock was subscribed in Great Britain, constituting Scotland and England, I (Charles Richardson) was unwilling to assume the whole responsibility for the

company, as they had eighty-five per cent. of the stock, so I suggested at a stockholders' meeting over there that they appoint a committee to work in harmony with us over here, which they did, and that went into effect it seems to me like in 1901 or 1902. I felt they had no way of expressing their views as to the policy of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company." (Trans. 136, 137).

There was nothing to show how many of the stockholders were present at this meeting nor how many voted for the creation of the advisory board. But even if this had been done, it would not have affected the case because under the statutes of the State of Washington creating corporations such a board would be illegal.

Under Section 3679 of Remington & Ballinger's Code, Section 3805 of Remington's Compiled Statutes of Washington, 1922, in prescribing the contents of the articles of incorporation it is provided among other things that said articles shall state "the number of trustees and their names who shall manage the concerns of the company for such length of time (not less than two nor more than six months) as may be designated in such certificate.

Under Section 3683, Remington & Ballinger's Code, Sec. 3809, said Remington's Statutes, in enumerating the powers of a corporation it is provided that when the certificate shall have been filed the

persons who shall have signed and acknowledged the same and their successors shall have power "to appoint such officers, agents and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation; and to make by-laws not inconsistent with the laws of this State or the United States."

Section 3686, Remington & Ballinger's Code, Sec. 3812 said Remington's Statutes, provides that "The corporate powers of a corporation shall be exercised by a board of not less than two trustees, who shall be stockholders in the company, at least one of whom shall be a resident of the State of Washington and a majority of them citizens of the United States * * * and who shall, after the expiration of the term of the trustees first elected, be annually elected by the stockholders at such time and place within this State and upon such notice and in such manner as shall be directed by the by-laws of the company."

So, according to the law of the State of Washington, the constitution, as it were, of a corporation, is its articles of incorporation. The statutes are the by-laws of the corporation and the governing power is the trustees of the corporation. There is no theory of law that would make admissible the testimony pointed out in the above assignments of error unless we should adopt as a legal maxim that a man can pull himself up by his own boot-straps. Defendant Richardson, to authorize an illegal act, tries to get the

authority of an illegal board, a creature of his own creation.

We think this error is so obvious that it needs the citation of no authority, but nevertheless refer the court to one Washington case, that of *Murray v. MacDougall & Southwick Co.,* 88 Wash. 358, in which it was held that a contract employing a manager of a corporation for a term of years is subject to termination by the trustees at any time, under Rem. & Bal. Code, Section 3683, providing that the board of trustees shall have power to appoint officers and "to remove them at will," and the contract is not enforceable on the theory of ratification by the unanimous vote of the stockholders, since they have no power to direct or compel the employment of any person, and to permit them to do so would defeat the policy of the law. And the court after quoting from Section 3683 of Remington & Ballinger's Code says: "It will be observed that the whole management of the corporation is in the board of trustees and the fact that the stockholders may have authorized or may have ratified an act does not take it without the statute."

So that according to this Washington decision the unanimous vote of the stockholders in the instant case would be incompetent and if the unanimous vote would be incompetent, the vote or opinion of eighty-five per cent. would be incompetent. But the court allowed the defendant to go further than this. He allowed the communications and actions of a committee alleged to represent eighty-five per cent. of the

stockholders concerning the compensation of Richardson to be introduced in evidence when there was nothing in the record to show that a majority of this eighty-five per cent. of the stockholders had ever created the advisory committee or elected anyone to act on same.

CONSENT OF OTHER AMERICAN STOCKHOLDERS IMMATERIAL.

The error in admitting the testimony of defendant that all of the other American stockholders consented to the five per cent. commission is controlled by the same principles as the error in admitting the transactions between Richardson and the advisory board. Under the laws of the State of Washington and the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the compensation of its officers. Even if a majority of the stockholders consented to this illegal five per cent. commission of Richardson's, their assent would not bind a protesting minority. (See the above cited statutes and decision of the State of Washington).

BOARD OF TRUSTEES COULD NOT DELEGATE DUTY OF HIRING RICHARDSON AND FIXING HIS SALARY.

The board of trustees of the Pacific Cold Storage Company could not delegate to the advisory board the duty of employing Richardson and fixing his

salary even if we assume, for the sake of argument, that the advisory board has a legal existence.

The defendant to the first and second causes of action, among other things, put up as a defense that "on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation; that on the 13th day of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regard your own remuneration—Since you raised the point a short time ago, the board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½%, beginning with the current year.
>
> "They trust that you will view these proposals as a favorable settlement."

Relative to this defense Mr. Denman testified that in January, 1912, Mr. Richardson informed him that he (Richardson) was to have the two and one-half per cent. in dividends additional salary and that on Denman's asking for some authority for the salary voucher Richardson said he would give him a letter instructing him to pay it to him, something he could use for authority in making payments as

auditor of the company, and that he did give him such a letter, but he never made it a matter of record in the board of trustees "and that is all I got." The letter referred to by Mr. Denman is in the following language, to-wit:

> "By virtue of a resolution passed by the advisory board at its annual meeting in January, 1911, I was voted 2½% as a bonus on all dividends declared in addition to my salary. You will therefore issue me a check for 2½% on dividends in addition to my regular dividend. Signed, Charles Richardson, President." (Trans-, p. 121).

Mr. Morehouse, a witness on behalf of the defendant, testified concerning the same as follows: "When that two and one-half per cent. extra remuneration first arose—I think it was in 1912 or thereabouts—I asked what was the authority for it and Mr. Denman at that time referred me to Mr. Richardson. I took the matter up with Mr. Richardson when I took up other matters arising from the examination, and then Mr. Richardson showed me the authority from the advisory board at Glasgow for that extra remuneration," and he said that he did not at that time show him anything in the minutes or tell him anything about the action of the board of trustees and he did not testify that at any other time Richardson ever showed him any authority from the board of trustees to pay this two and one-half per cent. bonus. (Trans., p. 170).

If there was ever any authority given by the board of trustees to pay Richardson this two and

one-half per cent. commission we may rest assured that he would have called it to the attention of Mr. Denman or Mr. Morehouse at that time. So that the only authority ever shown by the defendant for the payment to him of the two and one-half per cent. commission is derived from the advisory board.

The by-laws of the Pacific Cold Storage Company provide in Article 7, Section 1, "It shall be the duty of the board of directors to exercise a general supervision over the affairs of the company; to elect and remove all officers and servants;" and again, in Article 2, Sections 2 and 3, it is provided: "He (the president) may be removed from such office at any time by a majority of the board of directors. He (the president) may receive such remuneration as the board of directors may from time to time determine." The defendant justifies the payment to him of this two and one-half per cent bonus by an agreement made by him (the president) with the advisory board to pay himself the two and one-half per cent. commission.

In short, Richardson as president of the company, with no authority by law, by-law or contract from the board of trustees, makes a contract with an advisory board having no legal existence to pay himself a bonus of two and one-half per cent. on the total amount of dividend paid to the shareholders in each year. Is it his legal theory that two wrongs make a right?

The board of trustees could not delegate to de-

fendant the authority to make this contract on their behalf. It is tainted with illegality. Richardson would be serving two masters, the company and himself.

The board could not delegate this authority to the advisory board because it never had any legal existence and if it had, this duty is expresslly imposed by the by-laws on the board of trustees themselves. "The rule is supported universally that in the absence of authority, express or clearly implied, a board of directors or trustees cannot delegate to subordinate officers or agents the exercise of discretionary powers which by the general laws, the charter, by-laws, the vote of the stockholders or by usage has been vested exclusively in themselves." See Volume 2, *Thompson on Corporations,* Sec. 1204, p. 151; and also Volume 14A *Corpus Juris,* Sec. 1863, pp. 95, 96. In Section 1205 of the same volume of *Thompson on Corporations* it is said: "As an addition to this rule it may be stated that powers expressly granted to a corporation or what is the same thing to the board of directors or trustees by the statute, charter or by-laws, cannot be delegated."

The defendant attempts a similar justification for the payment to him of the five per cent. commission by the resolution of January 7, 1919. This resolution incorporates an agreement between Richardson and the advisory board consummated through correspondence of July 12, 1918, whereby Richardson said that "I will devote my time to the liquida-

tion of the company for a commission of five per cent. on the amounts returned to the shareholders, my salary to cease on September 30, 1918." This last resolution puts a greater strain on defendant's boot-straps than the two and one-half per cent. bonus agreement. On January 7, 1919, by a resolution of the board of trustees when the company had been practically liquidated Richardson attempts to make legal an agreement between himself and the advisory board entered into in January, 1918, when the bulk of the liquidation had been accomplished.

The above mentioned clause of the by-laws that "it shall be the duty of the board of directors to elect and remove all officers and servants" and also Section 4 of Article 7 that "neither the president nor any other officer or agent of this company shall have the power to contract any debts or incur any liabilities on the company's behalf without the authority of the board of directors" are both peculiarly apt. The board of trustees could not delegate to Richardson or the advisory board under the authority above cited the duty of fixing his own compensation. Richardson does not show any authority from the board of trustees to make this contract with himself on behalf of the board.

But suppose the defense attempts to prove the authority required by Section 4 by the testimony of Richardson, Moore, Davis and Stacy as to the loose discussion of the five per cent. commission at meetings of the board. In the first place, the date of none of these meetings is established. In the second place,

at none of them do they show the vote of the majority in its favor who are disinterested in the agreement. In the third place, there is no resolution shown by the board acting as such authorizing the payment of the five per cent. commission prior to the rendition of defendant's alleged services.

Where a corporation is empowered to act only through its directors, the individual or separate action of the members of such board is not sufficient for the agent of the corporation is the board of directors acting in its organized capacity and not its members individually. *Monroe Mercantile Company vs. Arnold,* 34 S. E. 176, 108 Ga. 449; *Peirce v. Morse-Oliver B. L. B. Co.,* 47 A. 914, 94 N. E. 406; *Lockwood v. Thunder Bay River Boom Company,* 4 N. W. 292, 42 Mich. 536; *Audenried v. East Coast Milling Company,* 59 A. 577, 68 N. J. Eq. 450; *Ames v. Gold Field Merger Mines Company,* 227 Fed. 292.

Thus in the case of *Audenried v. East Coast Milling Company* it was held that under the General Corporation Act, Section 12, providing that the business of every corporation shall be managed by its directors, the aid of a board of directors as a means of corporate action cannot be dispensed with by waiver on the part of the stockholders or otherwise.

Again, in the case of *Ames v. Gold Field Merger Mines Company,* decided by Judge Neterer, the judge in this case, it was held that the stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposi-

tion which is presented and which involves any interest of the company, and such consideration must be given and action taken in formal meetings. The directors have no power to act as such individually nor can they delegate the powers vested in them to act for the corporation to any officers or men, even though they are the majority stockholders.

So that even if the advisory board was shown to have ever been legally elected by a majority of the stockholders residing in Great Britain, the board of trustees could not delegate to them a duty involving the payment to defendant of $52,500 of the corporation's assets.

In addition to the transcript the internal evidence shows there was no resolution by the board of trustees prior to July 12, 1918, meeting the requirements of the corporation law. Thus, if there had ever been any legal resolution prior to July 12, 1918, the date of Richardson's letter to the advisory board fixing his compensation at five per cent, Richardson would never have had the board make the resolution of January 7, 1919; or if such a resolution had been adopted it would have referred to the board's legal resolution of some previous date and merely affirmed it and would never have attempted the dangerous expedient of trying to legalize an illegal agreement by an illegal resolution.

It may be urged, however, that the defendant did not know of the by-laws quoted above. But by-laws are the laws of a corporation and the officers

and trustees are conclusively presumed to know them. Thus in 14 *Corpus Juris,* Sec. 430, p. 345, it is said: "The members of a corporation as a general rule are conclusively presumed to have knowledge of its by-laws and cannot escape liability arising thereunder, or otherwise avoid their operation on a plea of ignorance of them." And again in the same volume, Section 434, p. 438, it is said: "The by-laws of a corporation are binding upon the directors and other officers not only when they are also corporators or members, as is usually the case, but even when they are not. Officers must be presumed to know the by-laws adopted before their appointment and are bound by them as to their tenure of office."

BACK PAY RULE

Although directors of a corporation are not technically trustees, since they do not hold the legal title, it is admitted law that they are within the rules governing the relation of trustees and *cestuis que trustent,* or of agent and principal.

Beers v. Bridgeport Spring Co., 42 Conn. 17; *Holder v. Lafayette, B.&M. R. Co.,* 71 Ill. 106; 22 *Am. Rep.* 89; *Cumberland Coal & Iron Co. v. Parish,* 42 Md. 598; *Hubbard v. New York, N. E. & W. Investment Co.,* 14 Fed. Rep. 675; *Mallory v. Mallory-Wheeler Co.,* 61 Conn. 131; 2 *Cook, Stock & Stockholders, Sections* 647, 648 and cases cited.

In the case at bar, however, the rules governing

the relation of trustees and *cestui que* trust are peculiarly apt because the defendant Richardson from the inception of the company was trustee as well as president and on May 31, 1918, he was expressly appointed by the stockholders to act as one of the trustees in liquidating the company. So he owed a duty to protect the company from the exorbitant claims of himself as well as others.

In 2 *Thompson on Corporations,* Sec. 1715, p. 799, it is said:

> "The general rule is that directors and trustees of corporations presumptively serve without compensation, and they are entitled to no salary or other compensation for performing the usual and ordinary duties pertaining to the office of director or trustee in the absence of some express provision or agreement to that effect."

Again in the same volume, Sec. 1717, p. 802, it is said:

> "As a general rule directors are not entitled to compensation or salary for official services rendered unless such salary or other compensation is provided for in the charter or the by-laws; or unless there is an express resolution or agreement adopted or made by the board of directors acting as such. In the absence of such provision or agreement, and except as otherwise shown, a director, and a president, secretary or treasurer, when a stockholder or a director, cannot recover pay for official service. In concluding an opinion on this subject one of the judges of the West Virginia court said: 'The authorities have led my mind to the conclusion that the

law raises no implied promise to pay compensation to directors, president or vice-president of a private corporation in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a *quantum meruit.'* The supreme court of Pennsylvania in an early case went so far as to say on this subject: 'If the services of the director become important to the corporation, let him resign and enter its employment like any other man. If it be proper that directors generally should receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until this be provided, there is no reason in law or morals for allowing their property to be taken without their knowledge or consent.' "

And again, in Section 1719, same volume, p 803, it is said:

"From principles already asserted, and as indicated by many of the cases cited, a general rule may be stated to the effect that, in order to entitle a director to receive compensation as against the rights of the corporation or of dissenting stockholders, some provisions therefor must be made in advance, either in the governing statute, the articles of incorporation, or the bylaws, or by a resolution duly passed or an agreement formally made by the board of directors acting as such.'

The last quotation from Sec. 1719 is the back pay rule as applicable to directors. To state the rule a little differently:

Directors of corporations cannot recover for services rendered the corporation as other officers,

unless upon a contract or resolution passed by the corporation, or by a vote of the board of directors in which they take no part, or upon some provision made for such compensation, made in the charter or by-laws, all of which must be before such services are rendered.

Graylor v. Sonora Min. Co., 17 Cal. 594; *Butts v. Wood,* 37 N. Y. 317; *Merrick v. Peru Coal Co.,* 61 Ill. 472; *Holder v. Lafayette, B. & M. R. Co., Lafayette, B. & M. R. Co. v. Cheeney,* and *Illinois Linen Co. v. Hough, supra; Citizens Nat. Bank v. Elliott,* 55 Iowa, 104; 39 *Am. Dec.* 167; *Kelsey v. Sargent,* 40 *Hun.* 150; 1 *Morawetz, Priv. Corp.,* Sections 517, *et seq.,* and cases cited; 1 *Beach, Priv. Corp.,* Section 201; *Doe v. Northwestern Coal & Transportation Co.* et al, 78 Fed. 62; *Kilpatrick v. Bridge Co.,* 49 Pa. St. 118; *Mather v. Mower Co.,* 118 N. Y., 629, 23 N. E. 993; *Smith v. Assn.,* 78 *Cal.* 289, 20 Pac. 677; *Burns v. Commencement Bay, Etc., Co.,* 4 Wash. 558; 30 Pac. 668; *Booth v. Summit Coal Mining Co.,* 55 Wash. 167, 104 Pac. 207; *Wonderful Group Mining Co. v. Rand,* 111 Wash. 557, 560, 561, 563.

To illustrate the last ruling in the case of *Doe v. Northwestern Coal & Transportation Company,* the court, on pp. 66 and 67, uses the following language: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation. In *Association v. Stonemetz,* 29 Po. St. 534,

in a case where there was no express regulation or contract that the director was to serve without pay, but the by-laws were silent upon that subject, the court said:

> 'A resolution, passed by the corporation after the services were rendered, that such director be paid a certain sum for services rendered as chairman of a committee, was without consideration, and imposed no obligation on the corporation that could be enforced by action.

"Of similar import is *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118. In *Railroad Co. v. Ketchum*, 27 Conn. 170, it was held that a director of a corporation is not entitled to compensation for services rendered to the corporation, unless the services were most unquestionably beyond the range of his official duties. In *Mather v. Mower Co.*, 118 N. Y. 629, 23 N. E. 993, it was held that, where a stockholder of a corporation becomes an officer thereof, and assumes the duties of the office, and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. The court said:

> 'It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and as such have the management of the corporate affairs. And to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate the fruits of corporate

enterprise. It would clearly be contrary to sound policy.'

"To the same effect is the case of *Road Co. v. Branegan,* 40 Ind. 361. In *Wilbur v. Lynde,* 49 Cal. 290, it was held that promissory note made bya corporation, payable to its acting trustees, is void. In *Smith v. Association,* 78 Cal, 289, 20 *Pac.* 677, it was held that a note made by a corporation to its president is invalid unless authorized or ratified by the board of directors, and that the payee of such a note was disqualified to vote upon such a resolution. The same doctrine is held in *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Railway Co. v. Teters,* 68 Ill. 144; *Wood v. Manufacturing Co.,* 23 Or. 20, 23 *Pac.* 848; and in numerous other cases which might be cited.'

Again, in the case of *Burns v. Commencement Bay, Etc., Co.,* 4 Wash. 558, it was held that a trustee of a corporation cannot recover pay for services rendered the corporation when such services are within the line of his regular duties as such trustee, unless there is some express provision therefor in the articles of agreement or by-laws, or some other authority therefor than the actions of the trustees themselves. And the court, commencing on page 565 and ending on page 566, uses the following language:

"It was not claimed by the plaintiff that any resolution had been introduced or acted upon in any of the meetings or the corporation, or of the board of trustees, relating to employing him in the matters aforesaid, or providing for his compensation therefor, which had not been entered upon the record. The verbal au-

> thorization that he claims to have had was not proven in any way excepting he seems to have conversed with various members of the company, and that there was a general understanding that he would superintend the construction of the wharf aforesaid; but, as we have seen, it was his duty as one of the trustees of the company to superintend the construction of said wharf.
>
> "It is further provided in the by-laws that the trustees should appoint and remove at pleasure all officers, agents and employes of the corporation and to prescribe their duties and fix their compensation, and this was the only provision therein contained relative to the compensation of any one, and it clearly did not include or authorize them to provide any compensation for themselves or any one of them for the performance of their duties as trustees."

In the instant case it is not shown by the defendant that any resolution had been introduced or acted upon by the board of trustees fixing his compensation prior to the rendition of his services commencing in November, 1917, and the by-laws of the Pacific Cold Storage Company provided that the president and other officers should receive such remuneration as the board of directors might from time to time determine and made no provision for compensation for any of the board of directors. (See Exhibit 1, By-Laws of Company).

Again the court on page 566, "according to his (plaintiffs) own claim, the one thing that was left to be determined was as to his compensation therefor. This understanding was disputed by some of

the other stockholders of the company and this goes to show the insecurity that would result and the objectionable nature of the rule that would allow a trustee of a corporation to recover pay upon an implied contract for services rendered which were within his regular duties," and the court further says:

> "There are some cases which hold that, in the absence of any express prohibition in the articles or by-laws of the corporation preventing its officers from receiving any pay, that they may recover pay on an implied contract for services rendered, although such services were within their duties as officers of the corporation. It seems to us, however, that the better authority is the other way, and that a trustee or officer of a corporation cannot recover pay for such services without an express provision therefor, and this must come from the articles of agreement or by-laws, or from some other source or authority than the action of the trustees themselves. Where a trustee of a corporation performs services which are clearly outside of his duties as trustee, as, for instance, where he is an attorney at law and attends to the litigation of the company, he may recover pay for such services, but it must appear before any recovery can be had therefor, or for any services rendered by a trustee in the absence of any provision for payment, that the same are outside of his official duties, so that there can be no room for doubt in the premises.

In *New York, Etc., R. R. Co. v. Ketchum,* 27 Conn. 169, it is said that—

> "Doubtless a director may perform extra labor, and for it be justly entitled to a compensa-

tion for his time and expenses, and this may be made out even without an express promise, for a promise may be implied from the peculiar and extraordinary services rendered, but then the services must appear to be of an extraordinary character, and this beyond all question of doubt, for as director he agrees to give his services, and is entitled to make no charges whatever, however severe and protracted may be his labors. A different rule would lead to great abuses and corruption. We cannot but think it important in every case, that, where a person holding the position of a director, expects or may be fairly entitled to expect a compensation for his services, the services should appear to have been agreed for, or their nature and extent should appear to be such as clearly to imply that both parties understood they were to be paid for, and not rendered gratuitously within the scope of a director's duty. * * * That directors have no right to charge for performing official duty, is a principle universally admitted to be sound law. We find it so laid down in the elementary books, and in several decided cases and the reasons assigned most forcibly commend themselves to our approbation.' "

So the Supreme Court of the State of Washington is committed to the doctrine that a trustee cannot recover pay on an implied contract for services or a *quantum meruit*. During practically all of the time the defendant was performing the alleged services for which he claims compensation in the sum of $52,500.00 he was acting as president and trustee and receiving a salary as president, so he cannot claim that the $52,500.000 was to pay him as president, and is caught on the other horn of the dilemma and must claim his compensation as one of the trus-

tees. He cannot, however, make good his claim for compensation as one of the trustees in liquidating the company because his services in liquidating the company commenced in November, 1917, and extended down to November, 1918, and there is no resolution fixing his compensation as such trustee prior to January 7, 1919.

In the case of *Booth v. Summit Coal Mining Company* it was held that an increase in the salary of an officer of a corporation who was a trustee and owned half of the stock, through his own vote and the votes of trustees subservient to him, is fraudulent and illegal, and this, regardless of the value of the services, where it was improperly made in violation of an agreement with the owner of the other half of the stock. And the court, on page 174, uses the following language:

"In *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 218 Pa. 298, 67 Atl. 417, the supreme court of Pennsylvania said:

" 'The generally accepted rule, applicable to such cases, is that the voting of a salary or compensation to a director, who either is or is not an officer of the board, must be entirely free from fraud, actual or constructive, and that the action is illegal, if it is determined by the vote of the director, or officer, whose salary is thus increased.'

"The only way in which the respondent Linden's salary could have been increased without his own vote was by his two dummy trustees, who, although trustees in legal form, were entirely subservient to his will. In *Strouse v. Syl-*

vester, 134 Cal. XX., 66 Pac. 660, it was held that an increase of the salary of an officer of a corporation, made by the vote of trustees subservient to him, was fraudulent and illegal."

If anyone would assume that the loose language of the defendant, Moore, Davis or Stacy proved that there had been any prior resolution by the board of trustees allowing the defendant his compensation, such resolution would be illegal because it would have had to have been determined according to their testimony by the vote of Charles Richardson himself.

The above case also shows the error of the court pointed out in Assignments of Error 5 and 6 in excluding the evidence offered by plaintiff to show that one of the members of the board of trustees was president of the bank in which the defendant was director, and that another was put on the board by Richardson, and that Moore and Davis, two others of the board, were working for the Pacific Cold Storage Company and owed their jobs to Richardson.

Again, in the case of *Wonderful Group Mining Co. v. Rand,* 111 Wash. 557, it was held that a board of trustees of a corporation consisting of five members cannot, by the passing of three resolutions, vote compensation for past services to four of the members, although one resolution was for a salary as secretary, one for a salary as treasurer, and the other for legal services to two other trustees, since all but one member were pecuniarily interested in the general plan, and to be valid it would be necessary that three dis-

interested members vote for the passage of each resolution. And the court, on page 560, uses the following language:

> "It is unnecessary for us, in view of the determination we are to make of the case, to pass upon the question of whether the board of trustees might, under such power as is contained in the by-laws here, vote back salaries to officers who may also be trustees.
>
> "The record in this case shows clearly that the rule of law which provides that a trustee may not vote upon his own compensation was violated by the resolution of June 3, and that the act of the trustees in passing a series of resolutions awarding money to four out of the five members of the board was void. It appears that the members of the board of trustees felt, and honestly, that, as they by their efforts had secured a favorable sale of the property of the corporation, resulting in a benefit to the stockholders, that therefore they should receive some compensation greater than that which would accrue to them merely through their ownership of stock. The method, however, by which they sought to obtain this extra compensation was not by a resort to the stockholders and from the stockholders to obtain authority to so compensate themselves. When they became members of the board of trustees they were charged with the duty of using their best efforts for the promotio nof the interests of the stockholders, and nothing was done but what should have been done by them in the performance of such duty. By the resolution the trustees were attempting to pay themselves for these general services under the guise of compensation for special services. The record in the case clearly indicates that these resolutions were merely a subterfuge. It appears that, at various times, discussions had taken place among the

trustees, the net result of which was that a majority of them were inclined to compensate themselves after the property was finally disposed of, and that, when it had become apparent that a sale was to take place, and it having in general been agreed to on or before June 3, and that in addition to the sale amount the company was in possession of $9,000, due on royalties on the original sale agreement, which it had decided to retain before agreeing to an extension and modification of the original sale agreement, and that compensation could be secured from that amount, and instead of submitting the matter to the stockholders, the device of June 3 was adopted.

"Granting that the board of trustees might compensate officers but not trustees for past services, it is the rule that, where concerted action of this kind is taken, the passing of a resolution awarding such pay must be had without the vote of any one pecuniarily interested in the resolution. The board of trustees consisting of five members, it was necessary for three disinterested members to vote for the passage of each resolution. The record shows that, of the four voting for each resolution, three were pecuniarily interested in the general scheme, although the scheme was divided into three resolutions. Taking, for instance, the resolution awarding salary to the secretary, we find it was voted for by the president, who was to receive compensation under a companion resolution; the treasurer, who was to receive compensation under a companion resolution, the secretary, who was to receive compensation under the resolution itself, and one of the members who had not pecuniary interest in the general plan."

And again the court says:

"In the case at bar, the affirmative vote of

at least two of the interested parties was needed to pass any one of the resolutions, and such trustees had no more right to vote on any of the resolutions than if only one resolution had been introduced embracing the contents of the entire three. *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Boothe v. Summit Coal Mining Co.,* 55 Wash. 167, 104 Pac. 207; *Smith V. Los Angeles etc. Ass'n,* 78 Cal. 289, 20 Pac. 677; *Steele v. Gold Fissure Gold Mining Co.,* 42 Colo. 529, 25 Pac. 349."

In the resolution of January 7, 1919, it was provided that the company would "retain the services of Mr. Davis and Mr. Moore for as short a time as possible, they, of course, to be paid their present salaries in the meantime by the company." The minutes show that Moore and Davis voted on this resolution, and again in the testimony of Mr. Moore where the defendant attempted to prove the passage of a resolution in 1918, Mr. Moore testified that those present at the meeting were Mr. Stacy, himself, Mr. Richardson and Mr. Davis. So if we can assume from his loose statements that there was ever a resolution the trustees who voted for same were three of them, namely, Richardson, Davis and Moore, profiting by the resolution. Further elaboration is useless to show the pertinence of the two last cited Washington cases.

In 2 *Thompson on Corporations,* Sec. 1728, p. 814, it is said:

"The general rule as to the right of directors to receive compensation for the discharge of the ordinary duties of their office applies

equally to the executive officers of the corporation. Such officers as president, vice-president, secretary, treasurer, etc., ordinarily are entitled to no compensation, unless provision is made therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made or entered into before the services were rendered. The rule is said to be analogous to that governing trustees generally, who, at common law, are not entitled to compensation, except pursuant to a contract or other proper authority. The rule has been applied in many jurisdictions to the president of private corporations, to the vice-president, and to other officers of corporations. The payment of additional compensation for services rendered under a previously fixed salary, or the payment for services rendered under an agreement that they should be without compensation, was said to be equivalent to the payment of claims which the corporation was under no legal or moral obligation to pay."

Again on p. 815, Sec. 1729, it is said:

"The officers stand in the same relation to the corporation as the directors; consequently, as in the case of directors, the law will not imply a promise by a corporation to pay its officers for their usual and ordinary duties, in the absence of any provision in the charter or by-laws, or any contract or agreement on the subject, but will presume that such services are rendered gratuitously. For example, the law implies no contract to pay the president for services as such and for consulting with and advising other officers and employes of the corporation. No implied promise can be inferred from the fact that the services were beneficial to the corporation; and while, in some relations, a request might be implied from the beneficial character

of the services, yet no such inference is authorized in the case of gratuitous services performed by a person in the line of his legal duty. It is a corollary of the main proposition that officers cannot appropriate the corporate funds in payment for their services without proper authority."

For additional authority to sustain the two preceding paragraphs from *Thompson on Corporations,* see the following cases:

Citizens National Bank v. Elliott, 39 Am. Rep. 167;
Cheeney v. Lafayette Bloomington Etc. R. Co., 18 Am. Rep. 584;
Kilpatrick v. Penrose Ferry Bridge Co., 88 Am. Dec. 497;
Butts v. Wood, 37 N. Y. 317;
Ellis v. Ward, 25 N. E. 530;
Danville H. & W. R Co. v. Case. 39 Atl. 301.

In the case of *Citizens National Bank v. Elliott,* 39 American Reports, 167, it was held that an officer of a corporation cannot recover of the corporation for his ordinary official services except by virtue of a special contract for compensation.

In that case the directors of a bank before the bank was formed agreed that the defendant, who in that particular case was bringing a counterclaim for his salary, should have and receive for his services as vice-president the yearly salary of Two Thousand Dollars, and the court held that the defendant could not recover on an agreement made with the directors of a bank before the bank was formed on the

ground that such an agreement for the payment of salary must be authorized by the by-laws of the corporation after its formation or by a resolution of the board of directors according to such by-laws, and the court says on page 169:

> "We understand the rule to be when an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover compensation therefor unless it has been so specially agreed. He cannot, in such case, recover what the services are reasonably worth."
>
> "It was immaterial what was said as to salaries before the corporation was organized. The corporation not being then in existence could not be bound by what was said or agreed upon. The fact the services were performed after the corporation was organized can make no difference unless there was an agreement by the corporation to pay therefor. The mere performance is not sufficient."

Again in the case of *Cheney v. Lafayette, Bloomington, Etc. R. Co.*, 18 American Reports 584, it was held that the director of a railroad company, whose by-laws made no provision for compensation to its officers, held, not entitled to recover for services performed as such director for the company, and the court said on page 586 to 587:

> "In the case of *The Am. Cent. R. R. Co. v. Miles,* 52 Ill. 174, it was held that a director could not recover compensation for services unless they were thus fixed by the directors, and the services of the president and other officers of the company, fall fully within the principle of the rule. The president and directors of such a

company are trustees for the stockholders, and it is for that reason that the law does not imply a promise to pay them for discharging the duties imposed upon persons occupying that relation.

"At the common law, a trustee was not entitled to compensation, and could not recover on a *quantum meruit.* And it was in the application of this rule that it was held, in the *Loan Association v. Stonemetz,* 39 Penn. 534, that a resolution passed by the corporation after services were rendered, that the officer be paid a sum of money for services as chairman of a committee, was without consideration, and imposed no obligation on the corporation that could be enforced. And the case of *N. Y. & N. H. R. R. Co. v. Ketcham,* 27 Conn. 170, illustrates the rule in holding that it does not matter that the services were rendered in the expectation and understanding that the officer should be paid. And in the case of *Butts v. Wood,* 37 N. Y. 317, it was held, notwithstanding the bill for services rendered by an officer where no by-laws or resolution had fixed his pay, and the bill was allowed by the board, that 'one holding a position of trust cannot use it to promote his individual interest in any manner in disposing of the trust property; that the circumstances under which the bill was allowed was a fraud on the shareholders, and to permit such a transaction to stand would be a reproach to the administration of justice.' "

"In *The N. Y. & N. H. R. R. Co. v. Ketcham,* 27 Conn. 175, the court uses this language: 'It would be a sad spectacle to see the managers of any corporation assembling together and parceling out among themselves the obligations and other property of the corporation in payment for past services.' "

Again in the case of *Kilpatrick v. Penrose Ferry Bridge Co.,* 88 American Decisions, 497, it was held

that officers of corporation cannot recover on *quantum meruit* for services rendered to the corporation as such officers. Without an express contract for compensation, no recovery can be had for such services. The court in this case on page 498 uses the following language:

> "The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution, either of the directors or stockholders, but where no salary has been fixed none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary. Hence, we held in *Loan Association v. Stonemetz,* 29 Pa. St. 534, as a general principle, that a director of a corporation elected to serve without compensation could not recover in an action against the company for services rendered in that capacity, though a subsequent resolution of the board agreeing to pay him for the past services was shown.
>
> "So in *Dunston v. Imperial Gas Company,* 3 Barn. & Ald. 135, a resolution formally adopted allowing directors a certain compensation for attending on courts, etc., was held insufficient to give a director a right to recover for such services.
>
> "And the rule is just as applicable to presidents and treasurers or other officers as to directors. In *Commonwealth Insurance Co. v. Crane,* 6 Met. 64, the company had passed a vote fixing the salary of its president at a certain sum per annum, but when another president was subsequently elected, and he claimed the same

salary, it was held that his claim did not stand on the footing of a written agreement, and that circumstances might be shown to raise the implication that he expected to serve without compensation.

"It is well that the rule of law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers."

Again on page 499, the court says:

"Corporations stand upon their charters, and although their officers are in a certain sense agents of the stockholders, they are also trustees whose rights and powers are regulated by law. That they may not consume that which they are appointed to preserve, their compensation must be expressly appointed before it can be recovered by action at law."

The case of *Butts v. Wood,* 37 N. Y. 317, presented the facts where a director presenting a bill for extra compensation as secretary was held disqualified to act as director to audit such a bill and held that the interested director must not be included in the number to constitute a quorum and that when such board audits the bill any stockholder may sue for himself and any other stockholder who makes himself a party to prevent the payment of the bill by the company. The citation concerns us by virtue of the rule announced by the court. The court says:

"The rule that one holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property, is now rigidly administered in every enlightened nation, and its usefulness and necessity become more and more apparent. A careful examination of the testimony in this case shows that Wood could not have enforced this claim against the company; and the circumstances under which it was allowed and paid were a fraud upon its stockholders. To permit such a transaction to stand would be a reproach to the administration of justice."

Again in the case of *Ellis v. Ward,* 25 N. E. 530, note the facts and the holding of the court. There the president of a corporation, who had served without agreement as to pay, sold his stock to three persons ,who thereby acquired control of the corporation, and made themselves directors. They then voted a sum of money to the president for his past services, and paid the money to him in part consideration for their stock. Held, that they were liable for said sum to the receiver of the corporation, since the president was not entitled to salary.

"The doctrine is well settled in this court that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, or the corporation legally make allowance and payment therefor, it must appear that a by-law or resolution had been adopted authorizing and fixing such allowance before the services were rendered. *Railway Co. v. Miles,* 52 Ill. 174; *Merrick v. Coal Co.,* 61 Ill. 472; *Railroad Co. v. Sage,* 65 Ill. 382;

Cheeney v. Railway Co., 68 Ill. 570, 87 Ill. 446; *Holder v. Railway Co.,* 71 Ill. 106; *Gridley v. Railway Co.,* Id. 200; *Linen Co. v. Hough,* 91 Ill. 63. The rule is analogous to that governing trustees generally, who at common law, were not entitled to compensation, except as there was warrant therefor in the contract or statute under which they acted. It is not pretended that, either by by-law or resolution, the Republic Life Insurance Company fixed any compensation to be paid its president for the performance by him of the duties of that office before or during the time John V. Farwell held that office; and after he ceased to hold such office, it was not competent for that corporation to vote and pay him for his past services. Such appropriation and expenditure of the money of the corporation by its then acting directors, being unauthorized and illegal, might be repudiated by the corporation, or its representative, the receiver, and the sums so wrongfully and illegally expended recovered back."

In the case of *Kleinschmidt v. American Mining Co.* (Mont.) 139 Pac. 785 it was held that when a director of a corporation, voluntarily or by the direction of the board, assumes to perform the duties of secretary or treasurer without prearrangement by resolution, or by-laws, or by contract for compensation, he is not entitled to recover for past services, and any appropriation made by the board for such services is equivalent to giving away the assets of the company.

Again, in the same case it was held that the board of directors of a corporation cannot vote a salary to themselves or to any director, unless au-

thorized by the stockholders, by statute, or by-laws legally enacted.

And also in the same case it was held that where directors of a corporation, under authority vested in them by Civ. Code, 1895, Sec. 401 (Rev. Codes, Sec. 3816), adopted a by-law providing for the appointment of a secretary, but never at any time fixed the compensation, a director who acted as such secretary was not entitled to any compensation.

And the court on page 789 of its opinion uses the following language:

> "According to the rule announced in *McConnell v. Combination M. & M. Co.,* in the original opinion (30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703), and affirmed on the motion for rehearing (31 Mont. 563, 79 Pac. 248), the board of directors has not the inherent power to vote a salary to any director. 'The power to do so must emanate from the stockholders, from the statute, or from by-laws legally enacted.' This rule is inflexible, and is recognized by the decisions and text-writers everywhere. (Citations). Equally inflexible is the rule that the directors —the managing officers of the corporation—cannot legally vote themselves compensation for past services. (Citations). So, also, when a director voluntarily or by the direction of the board, assumes to perform the duties of secretary or treasurer, without prearrangement by resolution or by-laws, or by *contract for compensation, he is not entitled to recover on a quantum meruit for past services, and any appropriation made by the board for such services is equivalent to giving away the assets of the corporation.* (Citations). 'From the employ-

ment of an ordinary servant, the law implies a contract to pay him. *From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or an agreement to the contrary, when directors are discharging the duties of other officers of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer.'* Again, in *Holder v. Lafayette, B. & M. R. R. Co., supra,* in denying the right of a director to recover for past services as treasurer of the corporation, the court said: 'The board of directors were in the possession of the funds and property of the corporation, and that body had entire control over it, and could disburse it as they chose, either by themselves, by one or more of their number, or by some other person not of the board of directors. Having done so through one of their members, we must suppose that they chose to regard it as a part of his duty as director. Had not such been the intention, it seems to us that a salary would have been provided by a by-law or resolution.' We think the facts disclosed in this case neither call for not permit any relaxation of the general rule."

The facts in the *Kleinschmidt* case are very similar to the facts in the case at bar. In that case the director voluntarily assumed the duties of secretary and treasurer and apparently received no compensation therefor. In this case the defendant Richardson from November, 1917, through September 30, 1918, was acting as trustee and president and received a salary as president all that time. He could not be compensated for his services as president as he had already been paid handsomely therefor; and even if he had not been paid he could not receive

compensation for performing the duties of president "without prearrangement by resolution or by-laws or by contract for compensation" and "he is not entitled to recover on a *quantu meruit* for past services." He could not receive the five per cent commission for his services as trustee or director because "the implication is that he serves gratuitously" and this presumption prevails in the absence of an understanding or agreement t othe contrary preceding the performance of the duties.

It is patent in this case that practically all of the liquidation services rendered by Charles Richardson preceded the resolution of January 7, 1919, and he did nothing after this latter date entitling him to pay. If, however, he had done anything after January 7, 1919, entitling him to $52,500.00 the burden of proof would be upon him to show this fact, and if he failed to do so and failed to show any services after January 7th distinct from those rendered from November, 1917, up until that date, the whole of the five per cent commission exacted by him would be illegal and plaintiff would be entitled to recover it back. In the absence of a resolution or agreement preceding defendant's services the burden of proof is on the defendant and not on the plaintiff to prove the legality of the alleged commission exacted by him.

The facts and opinion of the *Kleinschmidt* case are so exactly on all fours with the case at bar that we do not believe it is necessary for us to point out the similarily of the two cases.

We have cited no additional authority nor have we placed under a separate heading the proposition that where money has been illegally paid an officer or trustee, it may be recovered back because it naturally follows as a corollary from the doctrines laid down in the text. If, however, there should be any doubt in the Court's mind we refer to Volume 2, *Thompson on Corporations,* Sec. 1763, p. 849, where the author says:

> "Generally where money is paid or voted to an officer as compensation in the absence of an agreement or other proper authority made in advance, the payment is wrongful and may be recovered. This rule rests upon the same foundation as that which compels the restoration of corporate funds or property when wasted or squandered by the directors, or when received by third persons with knowledge of the want of power to transfer it. So, compensation paid an officer for past services, without prior provision or contract, was held to be without consideration and could be recovered."

Again in the same section at p. 851, the author says:

> "A stockholder may compel a president to account for money appropriated by him as an increase of his salary."

As further illustrations of the last proposition laid down in *Thompson on Corporations,* notice the case of *Danville H. & W. R. Co. v. Case,* 39 Atl. 301, in which it is held that money paid an official of a railway corporation on a resolution to recompense him for past services, for which no compensation has

been provided, is without consideration, and may be recovered back. The court in that case said on page 308: "But immense work, whether good or ill, Case performed; and, if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price. But up to November 9, 1871, there was no semblance of contract. Then the board undertook, by a retroactive resolution, to compensate him at the rate of $15,000 per year from March 21, 1867, until the next annual election, in January, 1872. The law is settled (*Loan Ass'n v. Stonemetz,* 29 Pa. St. 534, and cases following it) that no officer of a corporation can receive any compensation for the performance of official duty, except by express contract preceding the rendering of the services."

Again in an action against a corporation, plaintiff alleged that, in consideration that he had rendered services for the defendant in and about its business, at its special instance and request, defendant agreed to pay him $1,000. The affidavit of defense stated that plaintiff had been president of the corporation for 24 days at a salary of $1,800 per annum, and that the only services he had rendered the defendant were as president during said time. Held error to render judgment for want of a sufficient affidavit of defense, as a president of a corporation is not entitled to compensation for his services unless an agreement for compensation preceded them. *Martindale v. Wilson-Cass Co.,* 19 Atl. Rep. 680. The court in that case said on page 680:

> "The general rule on the subject of compensation to directors of a corporation is thus stated in 1 *Mor. Priv Corp.* (2d Ed.) Sec. 508: 'Directors are not entitled to any compensation for their official services as directors unless compensation is provided for by the charter or the by-laws adopted by the majority.' The decisions in *Kilpatrick v. Bridge Co.,* 49 Pa. St. 118, and *Association v. Stonemetz,* 29 Pa. St. 534, recognize and enforce this rule. In *Carr v. Coal Co.,* 25 Pa. St. 337, it was held that the secretary of a private corporation, at a fixed salary could not recover extra pay for services in that capacity, although the services were not anticipated at the time of his appointment, and were not enumerated in the charter or by-laws. The official services of a director or president of a private corporation are rendered about its business and at its request, but he cannot recover pay for such services unless an agreement for compensation preceded them. No presumption of such agreement arises from the services. It must be proven."

The facts of the case last cited closely resemble the facts here. The chief business of the Pacific Cold Storage Company from November, 1917, until November, 1918, was liquidating its assets. Thus, the defendant Charles Richardson on page 160 of the transcript said that when he left for California practically everything had been sold — "pretty nearly everything had been sold in November"—and that some time in 1917 in regard to the Alberta sales Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before he went up there discussing the whole situation, and it was decided what they would do in every particular up there; and the defendant was the president of the company during that period

and received a salary of $1,000.00 a month for his services until September 30, 1918, and a bonus of $5,000.00 in January, 1918. There was no agreement preceding the rendering of such services by him. There was no resolution of the board shown at all in 1917 prior to the rendering of the alleged services and no legal resolution shown in 1918. The facts here, however, are stronger than in that case because it could well be anticipated what Richardson's (defendant's) services would be to the Pacific Cold Storage Company. The defendant himself said: "That the question as to the liquidation of the Pacific Cold Storage Company came up the last time he was in Scotland. He could not recall when but thought it was either in 1913 or 1914. Some of the stockholders over there felt that in case of my death they would be helpless over here and we were discussing as early as 1914 and '15 the question of selling the cold storage company as a going concern and it came up during my visit to Scotland I think in 1914, but I cannot remember accurately. Then it continued in discussion with them and with the board here up until the final liquidation." (Trans. p. 135, 136). If the defendant thought it was worth more to liquidate an idle concern than to run a going one he had ample opportunity to take it up with the board of trustees from 1914 until November, 1917, when the actual liquidation commenced.

There is another difficult question the board should have answered in November, 1917, and that was this: If defendant Charles Richardson was to

receive $52,500.00 for liquidating the company, for what service did he receive $1,000.00 a month from November, 1917, through September 30, 1918, and the additional $5,000.00 in January, 1918?

PLAINTIFF SHOULD HAVE RECOVERED ON FIRST AND SECOND CAUSES OF ACTION UNDER BACK PAY RULE.

As to the two and one-half per cent of the dividends amounting to $18,000.00 appropriated by the defendant from 1912 to January, 1918, Mr. Denman testified:

"In January, 1912, Mr. Richardson informed me that he was to have the two and one-half per cent on dividends additional salary and I suggested to him that it be made a matter of resolutions or I asked for some authority for the voucher. He said he would give me a letter instructing me to pay it to him, something I could use for authority in making payments as auditor of the company, and he did give me such a letter. He never made it a matter of record in the board of trustees and that is all I got." (Trans. p. 121).

On the same subject Mr. Eli P. Moorehouse, witness for the defendant, said that the two and one-half per cent extra remuneration first arose in 1912 or thereabouts, when he asked what was the authority for it and Mr. Denman at that time referred him to Richardson. He took the matter up with Mr. Richardson when he took up other matters arising

from the examination and Mr. Richardson showed him the authority from the advisory board at Glasgow for that extra remuneration, and that he did not think he showed him anything in the minutes or told him anything about the action of the board of trustees. (Trans. p. 170.)

And there was no prior resolution allowing this two and one-half per cent shown in either the minutes or by any competent testimony and so the court clearly erred in excluding evidence that Miller had no knowledge of the two and one-half per cent commission on January 7, 1919, (See Assignment of Error 7), and he erred again in refusing to give plaintiff's requested instruction No. 1 in the following language, to-wit:

> "You are instructed that according to the Articles of Incorporation and By-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salary of its officers and that the plaintiff was one of the board of trustees, and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action." (See Assignment of Error 24).

If the court had given this instruction it would clearly have been the duty of the jury to have brought in a verdict for the plaintiff on the first and second causes of action.

REASONABLE VALUE OF DEFENDANT'S SERVICES INADMISSIBLE UNDER BACK PAY RULE.

It is clear that under the back pay rule testimony as to what defendant's services were reasonably worth was clearly inadmissible. Text book and case law have iterated and reiterated this rule and yet the court allowed eight witnesses to testify as to what they thought defendant's services were reasonably worth and several of them placed a value thereon of ten per cent instead of five per cent. (Assignment of Error 18, Trans. pp. 175, 177, 178).

A still more glaring error, he admitted the testimony of Ralph Stacy, one of the experts on the reasonable value of defendant's services, as follows, to-wit: "Furthermore, I had personal reasons for thinking it (meaning the five per cent commission) was all right. I had some stock which I bought in 1915 at seventy-two cents on the dollar. That stock eventually brought me 105, approximately $33.00 per share, almost fifty per cent." (Assignment of Error 23, Trans. pp. 196, 197.)

The admission of all of this testimony is an incurable and reversable error but the court did not stop there. Thus, in his ruling on defendant's motion for a non-suit he instructed the jury that defendant should be allowed an offset to plaintiff's suit of a reasonable compensation for defendant's services, and also that defendant would be entitled to a credit for the reasonable value of the service

which he performed after he ceased to receive the salary that was paid him. At that stage of the suit the court should have instructed the jury "that there was no resolution allowing defendant compensation for liquidating the Pacific Cold Storage Company other than that of January 7, 1919, which was void under the back pay rule." (Assignments of Error 10, 11 and 12).

ERROR OF ADMISSION OF TESTIMONY ACCENTUATED BY COURT'S INSTRUCTIONS

If we assume for the sake of argument that the court could have cured the above errors of admission of testimony by proper instructions, he signally failed to do so, and if the patient escaped with his life with the first errors the case could certainly not survive the last.

Thus, the plaintiff requested the following instruction:

> "You are instructed that for the month of September, 1918, the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1,995.00 on account of the fourth cause of action.' (See Assignment of Error 25.)

The plaintiff was certainly entitled to this instruction whether the case is viewed from the plaintiff's or the defendant's standpoint.

Under the back pay rule directors or officers of corporations cannot recover for services rendered the corporation unless upon a contract or resolution passed by the corporation or by a vote of the board of directors in which they take no part, or upon some provisions made for such compensation in the charter or by-laws, all of which must be before such services are rendered.

There is not shown on any certain date prior to January 7, 1919, any vote by the board of trustees or directors of the Pacific Cold Storage Company (in which Charles Richardson took no part) to allow defendant a five per cent commission on the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock before September 30, 1918, and so the plaintiff was entitled to recover the amount so appropriated by defendant amounting to $2.50 a share or $150.00 on the third cause of action and $1,995.00 on the fourth.

It is doubtful whether the board of trustees had the power to pass such a resolution if the defendant was at the same time to receive a salary of $1,000.00 a month. If it was legal for the defendant to receive a five per cent commission for returning the $500,-000.00 to the stockholders it was illegal for him to receive the salary. If it was legal for him to receive the salary it was illegal for him to receive the five per cent commission. The trustees of a corpora-

tion cannot make a present. It is not for the courts to choose for the defendant which he would accept in order to legalize an illegal act. If such resolution had been in advance of September, 1918, the defendant still had to answer the question "The lady or the tiger?" If he had taken both justice would have made him disgorge the five per cent commission.

The plaintiff is correct morally and legally but for the sake of argument let us adopt the theory of the defendant. Under the *ex post facto* resolution of January 7, 1919, defendant, a skilful and ingenious lawyer, endeavored to incorporate correspondence between himself and the advisory board dating back to July, 1918, and the agreement was in the letter from Richardson to such board in the following language: "I will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." Suppose the board could make a *nunc pro tunc* agreement of this sort, would anybody other than the defendant himself construe the language as meaning that Richardson was to get $25,000.00 in addition to his salary of $1,000.00 for the work done in September, 1918? If "self does not the wavering balance shake," anyone would say that even by the terms of Richardson's own resolution it was meant that his salary would compensate him for his services through September, 1918, and after that he was to be compensated by a commission of five per cent on the amounts returned to the shareholders.

The court's instructions on this phase of the case were:

> "In order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and return in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.
>
> "Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation.' (See Assignment of Error 30.)

And again:

> "In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the

salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount.' (See Assignment of Error 36).

It will be observed by these instructions that the court hopelessly intermingled his instructions as to the $25,000.00 exacted by the defendant for the $500,000.00 reduction of capital stock in September, 1918, with his compensation received for the liquidation of the rest of the assets of the company. We were entitled to the clean-cut instructions set forth in Assignment of Error 25.

The court also injects into both of these instructions the question whether the defendant's services were reasonably worth the $25,000.00 which is clearly erroneous according to text-book and case law.

The plaintiff asked for the following instruction:

"The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was passed by the Board of Trustees in January,

1919, giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919." (See Assignment of Error 26).

As aforesaid, a court or jury could not by the most severe stretch of the imagination construe the vague and uncertain testimony of Richardson, Moore, Davis and Stacy as proving by a scintilla of evidence that there was any legal resolution prior to January 7, 1919, giving the defendant the compensation therein set forth. In order for the defendant's five per cent commission to be legal it would be necessary that there should be a legal resolution of the board of trustees allowing same in substantially the same terms as the resolution of January 7, 1919, passed prior to November, 1917; and it will be observed that there was not even any clear cut agreement as to the defendant's compensation formulated by the defendant himself until July 12, 1918, and he did not even then present such agreement to the legally constituted board of trustees of the Pacific Cold Storage Company but only to this advisory board having no recognized legal existence.

If we were not entitled to the instruction shown in Assignment of Error 26 we were certainly entitled to the one requested according to Assignmnt of Error 27 and being in the following language:

> "You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

Instead of this instruction the court gave the ones referred to above and the one set forth in Assignment of Error 33 in the following language:

> "You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation."

This instruction was wrong for several reasons. It was immaterial what one or a majority of the stockholders thought was a reasonable sum to be paid defendant. The mere fact that they were stockholders would not qualify them as experts. If they were not experts their decision to give Richardson money could not affect Denman or any other dissenting stockholder. They could not be generous with somebody else's money.

The court also gave the following instructions:

> "If you are satisfied that the compensation is excessive then you can assess it to him—you should give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

and

> "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

(See Assignments of Error 34 and 35).

The last instruction is so glaring that it is hardly necessary to call it to the court's attention. What relevancy in law is the reasonableness of the value of defendant's services in this case? If relevant, what authority has a court or jury to consider the "thoughts" of an advisory committee having no legal existence in order to determine the value of defendant's services?

MILLER NOT ESTOPPED FROM ASSERTING HIS RIGHT

In the first and third affirmative defenses of defendant's answer he plead in substance that Charles A. Miller, the assignor to plaintiff of the fourth cause

of action, was a trustee of the Pacific Cold Storage Company and seconded the resolution of January 7, 1919, allowing Charles Richardson the five per cent. commission and he was therefore estopped from asserting any right to such five per cent commission paid to the defendant.

The minutes showed that Miller seconded the said resolution of January 7th and plaintiff offered to prove that this resolution had the correspondence already incorporated in it and was brought there by Mr. Richardson already typewritten, and that Miller did not know that Mr. Richardson was getting $1,000 a month or the two and one-half per cent commission prior to that time and that Miller was taken by surprise when he seconded the resolution, and the Court excluded the evidence and said: "I do not think that a person may be a party to a situation such as is recited in this resolution referring to the correspondence which appears in the minutes, and take affirmative action with relation to its adoption and having the other party proceed and act upon it and then afterwards say that he did not understand it. They (Denman and Miller) cannot have that issue presented in a collateral fashion." (See Assignments of Error 7 and 8 and Trans. pp. 122-123.)

The court again said: "He (Miller) is estopped —the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the Federal

court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far as the five per cent commission is concerned. (Assignments of Error 7 and 8, Trans. p. 126.)

It will be observed that the court threw out all of Miller's claim for the five per cent commission, both that taken by the defendant for the return of the $500,000.00 reduction of capital stock in September, 1918, and the rest of the capital return. The court does this in face of the fact that the resolution of January 7, 1919, provided "That I (Richardson) will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." Any reasonable man would interpret the resolution as meaning that Richardson would be compensated for his services by the salary of $1,000.00 a month until September 30, 1918, and thenceforth was to be paid on the commission basis. So that even on defendant's own theory the court erred in holding Miller was estopped from recovering the money misappropriated by defendant for the return of the $500,000.00 reduction of capital stock in September, 1918, and we believe that the following authority will convince this court that there was error also in holding that Miller was estopped from asserting his right against the defendant for the refunding of the commission exacted by him for the liquilation of the rest of the capital return.

In Pomeroy and other authorities on estoppel there are given three kinds of estoppels, namely, by matter of record, by matter in writing and by matter in *pais*. (Vol. 2 *Pomeroy's Equity Jurisprudence,* p. 1415).

This case does not fall under the two first kinds and so must be an estoppel in *pais*.

Pomeroy further states:

"Although the facts from which equitable estoppels arise are all matters in *pais* as distinguished from records and deeds, yet the whole doctrine is an expansion of and addition to the original legal estoppels in *pais,* and embraces rules unknown to the law when Lord Coke wrote. * * * The doctrine of equitable estoppel is preeminently the creature of equity. It has, however, been incorporated into the law and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles, it is administered in the same manner, and in conformity with the same rules, by the courts both of law and of equty, so that the decisions of either class of tribunals may be quoted as authorities in the subsequent discussion." (2 Pomeroy Equitable Jurisprudence, pp. 1416, 1417, 1418.)

Pomeroy gives the following definition as covering all phases and applications of the doctrine:

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely pre-

cluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." (Vol. 2, Pomeroy, pp. 1421, 1422).

The author then gives the following essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications: 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. 5. The conduct must be relied upon by the other party, and thus relying, he must be led to act upon it. 6. He must, in fact, act upon it in such a manner as to change his position for the worse.

See *Centennial Mining Co. v. Juah County* (Utah) 62 Pac. 1024, which gives substantially the same elements of estoppel as above.

Let us examine the facts in the light of these elements.

The first element is certainly lacking. There was no conduct on the part of Miller amounting to a representation or concealment of material facts. The plaintiff offered to show that there was a ready made typewritten resolution for the five per cent commission brought to the meeting of the board of trustees by the defendant himself.

The second element is lacking. We offered to prove that Miller did not know Richardson was getting the $1,000.00 a month salary nor the two and one-half per cent commission prior to that time and was taken by surprise when he seconded the resolution. Acts and declarations based on innocent mistakes as to legal rights will not estop one to assert the same. 16 *Cyc.* 733; *Mullen v. Shrewsbury,* (W. Va.) 55 S. E. 736; *Kent v. Williams,* (Cal.) 79 Pac. 527; *Smith v. Morrell,* (Colo.) 55 Pac. 824; *Southern Etc. Mining Co. v. Fuller,* (Ga.) 43 S. E. 64; *Bushnell v. Simpson,* 51 Pac. 1080. Miller at the time he voted for this resolution did not know that Richardson was receiving a salary of $1,000.00 a month and two and one-half per cent commission on dividends during practically all of the period for which he was being paid the five per cent commission called for in the resolution, and so would have the right to reconsider

his action and recover from Richardson the sums misappropriated from his own stock.

The third element is lacking. The truth concerning the resolution for the five per cent commission and all the facts in connection with it were certainly not unknown but known by Richardson both at the time of the passage of the resolution on January 7th and at the time of the taking of the commission by Richardson.

The fifth element is lacking. Richardson did not misappropriate this money because of his reliance upon the conduct of Miller, but Miller was rather a tool in his hands. To entitle Richardson to plead estoppel he must show that he was misled by the action of Miller. Thus, in *Kent v. Williams,* 79 Pac. 527, it was said: "A party will not be allowed to acquire property through error of fact or law where he was not misled."

The sixth element is lacking. There is no estoppel unless the party claiming it relied upon the conduct of the other party, was induced by it to act, and, thus relying and induced, did something whereby he will be prejudiced, if the plaintiff is permitted to assert his legal right. *Stevens v. Blood* (Vt.) 96 Atl. 697. It is difficult to see how the defendant has changed his position for the worse. He has had the use of $52,500.00 and if he gets it for six per cent interest he will be paying a lower rate than the banks now allow the average man. If, however, the court should allow no interest on plaintiffs re-

covery of his share of the money misappropriated, the defendant would not be in the same but in a better position than the average borrower.

Besides these elements there is another well recognized doctrine of estoppel applicable and that is that estoppel can never be asserted to defend or uphold crime, fraud or misdoing of any character. One reason for this is that under such circumstances the element of good faith is lacking, that being absolutely essential when one relies upon such plea. *Kirby v. V. P. Ry. Co.* (Colo.) 119 Pac. 1042; *in re Schoenfeld,* 190 Fed. 53; *in re Druil & Co.*, 205 Fed. 573; *Royce v. Watros,* 73 N. Y. 597; *Dunn v. National Bank of Canton* (S. Dak.) 90 N. E. 1045; *People ex rel v. Edgcomb,* 98 N. Y. S. 965; *C. M. & St. P. R. Co. v. Des Moines U. R. Co.,* 254 U. S. 196 (222); 65 *L. Ed.* 219 (233).

As an illustration of this rule it would not lie in the mouth of a hold-up man to say that his victim could not bring suit against him for the recovery of his ill gotten gains because he had failed to prosecute him for a year or two and he had thereby acquired extravagant habits which it would be impossible for him to shake off after he had disgorged his stolen funds.

Or to express this rule in the language used in the *Druil* (the Federal) case, "It has never been held that estoppel could be invoked to permit the party asserting it to perpetrate a fraud which would be

the effect in this case. The doctrine of estoppel against estoppel might well be applied to the trustee's plea.16 Cyc. 748."

This rule is a sort of branch of the principle that you must come into equity with clean hands. As seen above, estoppel is of legal origin but with equitable growth and in its modern application is more a creature of equity than of law. So it is absurd for the court to allow the defendant to assert an equitable rule in defense and yet deny the plaintiff the right to assert the corollary of this same rule.

In the *C. M. & St. P. R. Co.* case, the Supreme Court case above cited, the opinion says:

> "It seems to us the court below attributed undue weight to the conduct of the executive officers of the proprietary companies indicating acquiescence in a supposedly changed situation resulting from the amended articles. It would not be surprising if occasionally there was a failure to appreciate fully and accurately the rights and obligations growing out of the trust. But the Messrs. Hubbell, because of their fiduciary relation, are estopped from laying hold of the incautious, negligent, or mistaken acts of the executive officers as a ground on which to build up a profit or advantage for themselves at the expense of the proprietary roads which were their *cestuis que trustent.*"

And again on page 224 of the official reports and 234 of Law Ed., the court says:

> "But, because of their fiduciary character, they are debarred in equity from trafficking in the trust property in this or any other way,

> without the express consent of the beneficiaries, they would be bound to account for any profit that might accrue; and any seeming consent on the part of the beneficiaries to waive such profit in advance, not amounting to a termination of the fiduciary relation, is, in its nature, revocable."

The facts of the last cited case are on all fours with the instant case. Richardson stood in a fiduciary relation to Miller. Miller did not know that the back pay resolution of January 7, 1919, was calling for a duplication of the payment for Richardson's services from November, 1917, to September 30, 1918, and he did not know that this resolution was illegal and he was taken by surprise, and so Charles Richardson, on account of his fiduciary relation, is estopped from laying hold of the ignorance of fact and law of Miller. Millers' consent was more apparent than real and it did not amount to a termination of the trust relation between Richardson and himself and was therefore revocable.

The court says that if the plaintiff had an equitable right to have the resolution seconded by Miller set aside that should have been done, but he could not do it in this proceeding. "The equity and legal remedies may not be blended in the Federal court." We believe that we have answerd the court in our argument on estoppel. A man who asserts an equitable doctrine in defense must abide by all of its consequences. He who lives by the sword must perish by the sword. If, however, the court is not answered by the above argument he certainly would

be by the fundamental principles underlying the nature of the action for money had and received. The action of money had and received is of equitable origin proceeding from the maxim *ex aequo et bono* to the end of affording a remedy for the recovery of money in the possession of one which in good conscience belongs to another. It is recognized to be a flexible form of procedure commingling and administering equitable doctrines as well as those of the law. See *Early v. Atchison Etc. Ry. Co.* (Mo.) 149 S. W. 1170; *Todd v. Bettingen* (Minn.) 124 N. W. 443; *Cole v. Bates* (Mass.) 72 N. E. 333; *Knowles v. Sullivan,* 182 Mass. 318; 65 N. E. 389; *Henchey v. Henchey* (Mass.) 44 N. E. 1075; *Deal v. Mississippi Co. Bts.,* 79 Mo. App. 262; *Hall v. Marsten,* 72 Mass. 575.

This is an action for money had and received brought in Washington, a code state, so the following language in *Todd v. Bettingen* is peculiarly applicable to this case:

> "The charge and defense in this kind of action (an action for money had and received) are both granted on the truth and equity and circumstances of the case. The difficulty encountered at common law that a court of law may in this form of action go too far in the doctrine of equitable rights, is not presented in jurisdictions which like this are governed by the so-called Code Pleading. That system of pleading is designed to administer justice unhampered by the artificial distinctions and technicalities of the mere form of action or by the observance of strict demarkation between law and equity."

The fundamental principle is that under the doctrine of estoppel all of the facts and circumstances connected therewith are admissible in evidence. Therefore, the telegram of the defendant relative to the resolution of January 7, 1919, giving his understanding and meaning of same would certainly be admissible in evidence. The court would not give his reasons for excluding this telegram but the only conceivable reason would be on the theory of not allowing a collateral attack of the resolution. The wire in question was from Pasadena, California, dated February 14, 1919, to B. A. Moore, in the following language, to-wit:

> "B. A. Moore,
> Pacific Cold Storage Company,
> Tacoma, Washington.
>
> Your telegram a surprise. Wire or write me fully of any other stockholders connected with the matter and who they are. It was never my intention to charge him any part of my commission or anyone else connected with company. If Davis has not left ask him to get all information possible and write
>
> CHARLES RICHARDSON."

(See Assignment of Error 22).

From this telegram the inference is clear that the defendant did not charge any of the officers connected with the company his commission except Denman and Miller. So that Moore and Davis voted for a resolution on January 7, 1919, whereby they were to be retained by the company and receive a salary during the liquidation period, and in addi-

tion thereto were not to be charged the five per cent commission on their stock, which all of the other stockholders had to bear. Under the strict rule that trustees of a corporation cannot vote for a resolution whereby they will profit, Moore and Davis were clearly disqualified from voting on this resolution. So the telegram was admissible from every angle and the court erred in excluding it.

GIST OF THE CASE

The gist of the case is that the defendant Richardson, while acting as trustee and president of the Pacific Cold Storage Company without any previous authorization of either the board of trustees or stockholders of the company under the guise of a salary misappropriated $18,000.00, and while acting as trustee of the company without any preceding authority so to do by either the trustees or stockholders, under the guise of a commission for liquidating the company misappropriated $52,500.00. The defendant, in a vain endeavor to disguise these facts, has been Proteus like in his pleadings and evidence but fortunately the action of money had and received is an equitable, flexible and tenacious action and will never release a man until he has rendered unto Caesar the things that are Caesar's.

Respectfully submitted

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff in Error.